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Supreme Court, U.S.
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No. 90-289

In The

Supreme Court of the United States

October Term, 1990

F L AEROSPACE,

Petitioner,

-v-

AETNA CASUALTY & SURETY CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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QUESTIONS FOR REVIEW

I.

WHETHER THE FEDERAL APPELLATE COURT WAS BOUND BY THE *ERIE* DOCTRINE TO FOLLOW CERTAIN INTERMEDIATE STATE APPELLATE COURT DECISIONS, WHERE THE FEDERAL COURT DETERMINED THAT THESE DECISIONS IGNORE FIRMLY ESTABLISHED CONTRACT LAW PRINCIPLES SET FORTH BY THE STATE SUPREME COURT?

II.

WHETHER THIS COURT SHOULD ACT AS A REPOSITORY FOR DIVERSITY CASES IN WHICH PETITIONERS HOPE FOR A CHANGE IN STATE LAW FOLLOWING AN ADVERSE FEDERAL CIRCUIT COURT OPINION?

RULE 29.1 STATEMENT

Aetna Casualty & Surety Company is a wholly-owned subsidiary of Aetna Life & Casualty Company, a publicly-owned Connecticut corporation.

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F L AEROSPACE,

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AETNA CASUALTY & SURETY CO.,

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Petitioner's statement is inexcusably slanted, and attempts to re-argue the late notice issue upon which Aetna prevailed in the District Court. That issue was not a subject of the Court of Appeals opinion and hence is irrelevant to this petition. Respondent believes this Court will be sufficiently guided by the recitation of facts that occurs in the opinion of the United States Court of Appeals in *F L Aerospace* v *Aetna Casualty & Surety Co.*, 897 F 2d 214 (CA 6, 1990).

REASONS FOR DENYING THE WRIT

Respondent respectfully submits that this Court should deny the Petition for Writ of Certiorari for two reasons:

1) Neither of the issues raised by Petitioner fall within the criteria set forth in Rule 10, captioned *Considerations Governing Review on Certiorari.*

2) Neither of the issues has substantive merit.

POINT I

WHERE CERTAIN STATE INTERMEDIATE APPELLATE COURT DECISIONS HAVE INTERPRETED THE RELEVANT CONTRACTUAL PHRASE IN A MANNER THAT IGNORES BLACK LETTER DECISIONS OF THE STATE SUPREME COURT, THE *ERIE* DOCTRINE NOT ONLY PERMITS BUT COMMANDS THAT THE INTERMEDIATE APPELLATE COURT DECISIONS NOT BE FOLLOWED.

Under *Erie Railroad Co.* v *Tompkins*, 304 U.S. 64 (1938), a federal court has one primary role in diversity cases: to decide the case as would the state supreme court.

In fulfilling this obligation, a federal court must look first at the decisional law of the state's highest court in analogous cases and relevant dicta in related cases. *See Angelotta* v *American Broadcasting Corp.*, 820 F 2d 806, 807 (CA 6, 1987); *Bailey* v *V&O Press Co.*, 770 F 2d 601, 604 (CA 6, 1985). Where no direct authority exists from a state's highest court, the federal court must ascertain from all available data what the state's highest court would decide if faced with the issue. *Grantham & Mann, Inc.* v *American Safety Prods., Inc.*, 831 F 2d 596, 608 (CA 6, 1987).

Intermediate appellate decisions and state trial court decisions provide guidance only to the extent they reasonably predict how the state supreme court would decide an issue; "a federal court is not bound by lower court determinations if convinced by other data that the state's highest court would determine otherwise." *Bailey, supra* at 604. *Cf. Commissioner* v *Estate of Bosch*, 387 U.S. 456, 465 (1967) (intermediate state appellate decisions are "not controlling" in federal diversity cases); *King* v *Order of Travelers*, 333 U.S. 153 (1948) (same); *Itrich* v *Huron Cement Division*, 670 F Supp 199, 202-203 (ED Mich, 1987) (same).

Certainly, the Sixth Circuit in the instant case was not unmindful of the persuasive significance of intermediate court decisions. Indeed, it recognized that such decisions were not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. *FL Aerospace* v *Aetna*, 897 F 2d 214, 218-219 (CA 6, 1990), citing *Woodruff* v *Tomlin*, 616 F 2d 924, 929 (CA 6, 1980). Thus, Petitioner is unable to meaningfully argue that the court below rejected either the *Erie* doctrine or its corrolaries; Petitioner is reduced to argue that the court below should not have been persuaded by other data that the Michigan Supreme Court would reject the intermediate appellate decisions championed by Petitioner and other waste generators. Such a contention does not implicate the certiorari jurisdiction of this Court under any of the criteria listed in Rule 10.

The court below recognized that to be faithful to *Erie*, it must reject Michigan intermediate appellate decisions if it believed that the Michigan Supreme Court would rule otherwise. *Dale Baker Oldsmobile, Inc.* v *Fiat Motors of N. Am., Inc.*, 794 F 2d 213, 218 (CA 6, 1986). *See, e.g., Borden, Inc.* v *Affiliated FM Insurance Co.*, 682 F Supp 927, 929 (SD Ohio, 1987) (previous intermediate appellate authority rejected because "the Ohio Supreme Court would not adopt the construction of the pollution exclusion set forth in [the prior case]"), aff'd, 865 F 2d 1267 (CA 6, 1989)[1]; *Ray Industries, Inc.* v *Liberty Mutual Insurance Co.*, 88-73445 (ED Mich, Dec. 1, 1989) (the Michigan Supreme Court would not follow *Polkow* v *Citizens Insurance Co. of America*, 180 Mich App 651; 447 NW 2d 853

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[1] Observe that in *Borden*, the waste generator filed a petition for certiorari to the Court of Appeals for the Sixth Circuit, raising precisely the same issue. This Court denied the petition, 110 S Ct 68 (1989).

(1990) because "*Polkow* rewrites the insurance contract by collapsing the definition of occurrence and the exception to the pollution exclusion, in effect removing the pollution exclusion"); *Fireman's Fund Insurance Co.* v *Ex-Cell-O Corp.*, 702 F Supp 1317, 1325 (ED Mich, 1988) (declining to follow *Jonesville Products Co., Inc.* v *Transamerica Insurance Group*, 156 Mich App 508; 402 NW 2d 46 (1986), because that decision "is unsupported by reasoning or authority, is contrary to the better reasoned, more recent decisions interpreting 'sudden and accidental', and is against the more reasonable interpretation of the word 'sudden'").

The other data that the Court of Appeals analyzed in this case consisted largely of Michigan Supreme Court rulings governing construction of contracts. The principles derived by the Court from these cases are unimpeachable, and deserve to be emphasized:

> "Michigan law is settled concerning the interpretation of provisions in insurance contracts. In Michigan, the rules for the construction of an insurance contract are the same as for any other written contract. *Hall* v *Equitable Life Assur. Soc'y*, 295 Mich 404; 295 NW 204 (1940). Any ambiguous terms must be construed against the insurer and in favor of the insured, because the insurer drafts the document. *Mays* v *Insurance Co. of N. Am.*, 407 Mich 165; 284 NW 2d 256 (1979). On the other hand, if the terms in the policy are not ambiguous, 'no construction, in the usual sense of the word, is called for'. *Schiff* v *Automobile Ins. Co.*, 290 Mich 457, 287 NW 920 (1939); *see also Indemnity Ins. Co. of N. Am.* v *Geist*, 270 Mich 510; 259 NW 143 (1935). When the words are free from ambiguity, 'the instrument is always to be construed accord-

> ing to the strict, plain, common meaning of the words themselves'. *Hall*, 295 Mich at 408; 295 NW at 206. Moreover, the plain meaning of words should not be perverted merely to benefit the insured party. *Wozniak* v *John Hancock Mut. Ins. Co.*, 288 Mich 612; 286 NW 99 (1939)." *FL Aerospace, supra*, p 219.

Having then found that the terms "sudden" and "accidental" were not ambiguous, and that the term "sudden" had a temporal meaning, the Court was led inexorably to the conclusion that the Michigan Supreme Court would reject any interpretation of the phrase "sudden and accidental" which lacked a temporal element. Compare *United States Fidelity and Guaranty Co.* v *Star Fire Coals, Inc.*, 856 F 2d 31, 34 (CA 6, 1988), wherein the phrase "sudden and accident" was similarly construed in a Kentucky diversity case, Kentucky contract law being virtually indistinguishable from that of Michigan.

Petitioner's Brief is oddly silent concerning the lower court's reliance upon contract law principles derived from Michigan Supreme Court decisions. Petitioner would have had the court examine other information which, according to Petitioner's argumentative agenda would have persuaded the court to go the other way.

First, Petitioner believes the Court of Appeals should have been compelled to examine certain unspecified "insurance industry documents" which allegedly gave clues to the insurance industry's own interpretation of the pollution exclusion clause. Yet, none of these documents were introduced into the record before the trial court, and they were not even referred to until after the Court of Appeals had made its decision. The Court of Appeals can properly consider only the record and facts considered in the District Court. FRAP 10(a); *Manning*

v *Lockhart*, 623 F 2d 536, 538 (CA 8, 1980). *See also* 9 Moore's Federal Practice (2d Ed), § 210.04 (1983), citing *United States* v *Mills*, 597 F 2d 693, 698 (CA 9, 1979) and *Commonwealth of Massachusetts* v *United States Veterans Administration*, 541 F 2d 119, 123 (CA 1, 1976). Thus, the Court of Appeals would have been barred from considering these documents, even if Petitioner's appellate counsel had attempted to refer to them in his appellate briefs or oral argument.

Petitioner also believes that the Sixth Circuit should have considered the definition of the term "accident" which appears in Chief Justice Dorothy Comstock Riley's opinion in *Allstate Ins. Co.* v *Freeman*, 432 Mich 656; 443 NW 2d 734 (1989). Petitioner correctly observes that the definition of that term contains no temporal element. This concept is hardly persuasive, and is in fact irrelevant, as it is the word "sudden" that injects the temporal meaning into the phrase "sudden and accidental." See *F L Aerospace, supra*, at 219-220. Other courts have recognized that the "sudden" element of the phrase "sudden and accidental" must be independently observed. *See, e.g., Star Fire Coals, Inc.*, supra; *Techalloy Co.* v *Reliance Ins. Co.*, 338 Pa Super 1; 487 A 2d 820 (1984); *Technicon Electronics Corp.* v *American Home Assurance Co.*, 74 NY 2d 66; 544 NYS 2d 531; 542 NE 2d 1048 (1989) ("Since the exception is expressed in the conjunctive, both requirements must be met for the exception to become operative. Stated conversely, discharges that are neither nonsudden or nonaccidental block the exception from nullifying the pollution exclusion").

Finally, Petitioner argues that the lower court should have taken into consideration "the plethora of case law in a number of states holding that 'sudden and accidental' are ambiguous terms." (Petition for Writ of Certiorari, p 12). Yet, there are plenty of foreign decisions

going the other way.[2] In fact, certain intermediate appellate decisions in the State of Michigan have begun to recognize that the phrase "sudden and accidental" is not ambiguous and does contain a temporal element. See *Protective National Ins. Co.* v *City of Woodhaven*, No. 101968 (Mich Ct App Sept. 28, 1988); *Chemetco, Inc.* v *Citizens Ins. Co.*, No. 109913 (Mich Ct App Feb. 13, 1990).

The *Erie* doctrine was respected by the lower court and there is no reason for issuance of a Writ of Certiorari.

POINT II

THIS COURT SHOULD NOT ACT AS A REPOSITORY FOR DIVERSITY CASES IN WHICH PETITIONERS HOPE FOR A CHANGE IN STATE LAW FOLLOWING AN ADVERSE FEDERAL CIRCUIT COURT OPINION.

Petitioner invokes the *Pullman* doctrine in an endeavor to obtain a Writ of Certiorari or some manner of stay order pending resolution of the consolidated pollution cases by the Michigan Supreme Court. Petitioner has misemployed the doctrine. Additionally, the relief Petitioner prays for would be inconsistent with sound judicial policy.

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[2] *Technicon Electronics Corp.* v *American Home Assurance Co.*, 74 NY 2d 66; 544 NYS 2d 531; 542 NE 2d 1048 (1989); *Techalloy Co.* v *Reliance Ins. Co.*, 338 Pa Super 1; 487 A 2d 820 (1984); *Centennial Ins. Co.* v *Lumberman's Mutual Casualty Co.*, 677 F Supp 342 (ED Pa, 1987); *International Minerals and Chemical Corp.* v *Liberty Mutual Ins. Co.*, 168 Ill App 3rd 361; 522 NE 2d 758 (1988); *American Motorists Ins. Co.* v *General Host Corp.*, 667 F Supp 1423 (D Kan, 1987); *Fischer & Porter Co.* v *Liberty Mutual Ins. Co.*, 656 F Supp 132 (ED Pa, 1986); *Waste Management of Carolinas, Inc.* v *Peerless Ins. Co.*, 315 NC 688; 340 SE 2d 374 (1986); *State* v *Amro Realty Corp.*, 697 F Supp 99 (ND NY, 1988); *Hayes* v *Maryland Casualty Co.*, 688 F Supp 1513 (ND Fla, 1988); *EAD Metallurgical, Inc.* v *Aetna Casualty & Surety Co.*, 701 F Supp 399 (WD NY, 1988).

Since this Court's decision in *Railroad Commission* v *Pullman Co.*, 312 U.S. 496 (1941), the following has been the policy of this Court:

> "[W]hen a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question. *Harris County Commissioner's Court* v *Moore*, 420 U.S. 77, 83 (1975)."

See also Moses H. Cone Hospital v *Mercury Construction Corp.*, 460 U.S. 1, 9 fn 7-8 (1982); *Orr* v *Orr*, 40 U.S. 268, 285-286 (1978) (*Stevens*, J. concurring). The *Pullman* doctrine is the source of the statement rudely extracted from its proper context by Petitioner that appears in the *Harris* case:

> "Where there is an action pending in State Court that will likely resolve the state-law questions underlying the federal claim, we have regularly ordered abstention." *Harris, supra*, p 83.

The "federal claim" referred to in the preceding statement is a *federal constitutional* claim. The lawsuit by F L Aerospace against Aetna sought to resolve questions of contractual interpretation, and did not involve questions of federal constitutional law at all.[3] This dispositive distinction should put this matter to rest. However, there is an irony in Petitioner's attempt to invoke the *Pullman* doctrine that merits comment. Since the *Pullman* doctrine is a doctrine of abstention, it has probably never before been raised by a petitioner. As with the 6th Circuit Court of Appeals, Petitioner asks this Court for affirmative relief, not for an abstention.

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[3] In fact, no federal question of any kind is presented.

Independently, the relief requested by Petitioner would, if granted, create poor judicial policy. This Court rarely grants any form of appellate relief in diversity cases. Yet, Petitioner desires this Court to grant certiorari, or enter some sort of order reserving its right to grant contingent future relief, because there are now pending in the Michigan Supreme Court cases which might generate state law inconsistent with that determined by the 6th Circuit Court of Appeals in this case.[4] Respondent is aware of no case wherein such relief has been granted by this Court, and Petitioner provides no sound reason for the granting of such relief.

At any given time, there are more than 50 cases pending before the Michigan Supreme Court for plenary review. As of June 29, 1990, there were 70 cases pending before that court. (1990 Michigan Appellate Digest). If the highest courts of all 50 states had a similar case load, there would be approximately 3,500 cases currently undergoing review before the highest state courts, any one of which could alter the extant common law. Suppose that for each such case there existed one case recently adjudicated on appeal by a federal circuit court involving issues being appealed to the state supreme court. If this Court accepted certiorari in this case based upon Petitioner's Issue II, or issued some manner of stay order, this *Aerospace* doctrine could generate at least 3,500 additional cases on this Court's docket, assuming this Court invoked the doctrine in every case where it could be applicable.[5]

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[4] *Upjohn Co.* v *New Hampshire Ins. Co.*, 178 Mich App 706; 444 NW 2d 813 (1989); *Protective National Ins. Co.* v *City of Woodhaven*, No. 101968 (Mich Ct App Sept. 28, 1988); *Polkow* v *Citizens Ins. Co. of America*, 180 Mich App 651 (1990).

[5] It would indeed be complicated to generate a rule limiting application of the *Aerospace* doctrine.

Moreover, for this Court to adopt a new doctrine concerning review of diversity cases, it would have to have a firm rationale. Petitioner offers no such rationale. Presumably, Petitioner would argue that there should be consistency in the adjudication of cases. Yet such a goal cannot be achieved by any remedial construct. Whenever state law is in the process of change, either through Supreme Court review or legislative action, litigants pressing their cases over the period of time before and after the change will encounter disparate results. Such a disparity in results over time is inherent in a judicial system in which intermediate appellate decisions may be reversed, and in which even within one level of appellate law making, the doctrine of *stare decisis* is not absolute.[6]

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: September 4, 1990

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[6] Observe that the Michigan Supreme Court reversed itself on an issue of interpretation of state legislation, *Cassidy* v *McGovern*, 415 Mich 483; 330 NW 2d 22 (1982), supplanted by *Di Franco* v *Pickard*, 427 Mich 32; 398 NW 2d 896 (1986); or consider *Beauchamp* v *Dow Chemical Co.*, 427 Mich 1; 398 NW 2d 882 (1986) in which the Supreme Court's decision concerning MCL 418.131; MSA 17.237(131), was legislatively reversed by an amendment to that statute. 1987 P.A. No. 28, imd. eff. May 14.